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EXAMINER

GWARTNEY, ELIZABETH A

ART UNIT

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1794

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DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/524,369	Applicant(s) SCHNIEBER ET AL.	
	Examiner Elizabeth Gwartney	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 March 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11 and 13-18 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11 and 13-18 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

1. The Amendment filed 03/10/2009 has been entered. Claim 12 has been cancelled.

Claims 1-11 and 13-18 are pending.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1-18 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 1 recites in step (b) "applying a dry component to said liquid coated core, thereby forming an edible layered component selected from the group consisting of peanut butter, jelly, cheese, caramel, cream cheese, cookie dough or fruit." There is support in the specification for a *soft edible layer*, and not an *edible layered component*, that is selected from the group consisting of a peanut butter, jelly, cheese, caramel, cream cheese, and mixtures thereof.

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5. Claims 1-18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 1 and 14, the recitations “substantially covers” and “substantially surrounds” render the claims indefinite. It is not clear what level of coverage is encompassed by "substantially covers" or “substantially surrounds."

Regarding claim 10, the disclosure of *yogurt* and *tomato sauce* render the claim indefinite. Given that the method of claim 1 requires coating said outside surface of said edible core with a base liquid, since yogurt and tomato sauce have liquid like rheological properties, it is not clear how yogurt and tomato sauce meet the limitation of an edible core with an outside surface and likewise, how they would be coated with a base liquid.

Regarding claims 11 and 12, the disclosure that the soft edible layer is *jelly* renders the claim indefinite. Given that the method of claim 1 requires coating said outside surface of said edible core with a base liquid followed by the application of a dry component it is not clear how jelly is both a base liquid and a dry component.

Regarding claim 14, the disclosure of *yogurt* and *tomato sauce* render the claim indefinite. Given that claim 14 requires an edible core with an outer surface and that the outer surface is coated with a tacky soft edible layer, since liquid, since yogurt and tomato sauce have liquid like rheological properties, it is not clear how yogurt and tomato sauce meet the limitation of an edible core with an outside surface and likewise, how they would be coated with a tacky soft edible layer.

Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-3, 6-10, 14, 16 and 18 are rejected under 35 U.S.C. 102(b) as being anticipated by Given et al. (US 4,888,187).

Regarding claims 1-3, 10 and 12, Given et al. disclose a method of making a shelf stable edible confectionery bar (Abstract, C6/L27-29) comprising the steps of: (A) providing a natural fruit center having an outside surface (i.e. core) (see fruit core center cylindrical or related shape - Abstract, C3/L51-55); (B) applying a soft edible layer that encapsulates the outside surface of said natural fruit center (Abstract, C3/L59-65); wherein the said soft edible layer is applied by a method comprising the steps of: (a) coating the outside surface of the natural fruit center with caramel (i.e. base liquid) (Abstract, C3/L59-60); (b) applying chopped nuts to caramel coated natural fruit center (Abstract, C3/L60-61); and (c) cooling the coated natural fruit center to set the compound coating (i.e. drying - C7/L19-20/Example 1).

Given that Given et al. disclose a confectionery bar with a water activity level of less than 0.5 at 25°C (Abstract), it is clear that the soft edible layer component of the confectionery bar would inherently have a water activity of less than 0.5 at 25°C.

Further, given that Given et al. disclose a soft edible layer identical to that of the present invention, it is clear that it would inherently have a hardness value of 6 or less as determined by Descriptive Analysis Testing in ASTM MNL13.

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Regarding claims 6-7, Given et al. disclose all of the claim limitations as set forth above and wherein the base liquid comprises corn syrup (C6/L44-46) and the dry component is nuts (i.e. protein and fat based) (Abstract, C3/L59-60).

Regarding claim 8, Given et al. disclose all of the claim limitations as set forth above and that the nuts comprise salt (*see* salted peanuts – C7/Example 2).

Regarding claim 9, Given et al. disclose all of the claim limitations as set forth above and that the nuts are roasted and salted peanuts (C7/Table 3). Given that Given et al. disclose roasted peanuts, it is clear that inherently the peanuts were treated to a roasting step.

Regarding claim 14, Given et al. disclose a shelf stable edible confectionery bar (Abstract, C6/L27-29) comprising: a natural fruit center having an outer surface see fruit core center cylindrical or related shape - Abstract, C3/L51-55); and a tacky soft edible layer (i.e. caramel and nuts), wherein said tacky soft edible layer encapsulates the natural fruit center and said confectionery bar has a water activity of less than 0.5 at 25°C.

Given that Given et al. disclose a confectionery bar with a water activity level of less than 0.5 at 25°C (Abstract), it is clear that the soft edible layer component of the confectionery bar would inherently have a water activity of less than 0.5 at 25°C.

Given that Given et al. disclose a soft edible layer identical to that of the present invention, it is clear that it would inherently have a hardness value of 6 or less as determined by Descriptive Analysis Testing in ASTM MNL13 and a density of at least about 0.99 g/cc.

Given that Given et al. disclose a shelf stable coated confectionery bar with a water activity less than 0.5 at 25°C identical to that presently claimed, it is clear that it would inherently be microbiologically stable for at least 2 months.

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Regarding claims 16 and 18, Given et al. disclose all of the claim limitations as set forth above and that the soft edible layer is comprised of corn syrup and is caramel (Abstract, C3/L59-60, C6/L44-46)

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

10. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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11. Claims 4-5, 13 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Given et al. (US 4,888,187).

Regarding claims 4-5, Given et al. disclose all of the claim limitations as set forth above but the reference does not explicitly disclose a method further comprising step (d) coating said edible layered component with a second liquid, step (e) applying a second dry component to said liquid coated component of step (d), and (f) drying the edible layered component after step (e).

Mere duplication of steps has no patentable significance unless a new and unexpected result is produced. Thus, it would have been obvious to one of ordinary skill in the art at the time of the invention to have coated said edible layered component with a second liquid, applied a second dry component and dried the edible layered component.

Regarding claims 13 and 15, Given et al. disclose all of the claim limitations as set forth above. While Given et al. a shelf stable confectionery cylindrical in shape and having a linear dimension of about 6 to 7.5 cm (C7/Example 1), the reference does not explicitly disclose that the confectionery is bite sized.

Since the instant specification is silent to unexpected results, it would have been obvious to one of ordinary skill in the art at the time of the invention to have changed the size of the confectionery bar. Change in *size* is not patently distinct over the prior art absent persuasive evidence that the particular configuration of the claimed invention is significant. See *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976); *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). MPEP 2144.04[R-1]

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12. Claims 11 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Given et al. (US 4,888,187) in view of Beharry (WO 02/11554).

Regarding claims 11 and 17, Given et al. disclose all of the claim limitations as set forth above. Given et al. does not disclose wherein the edible core is comprised of peanut butter and said soft edible layer is jelly.

Beharry teach a snack bar having a nut spread filling (i.e. peanut butter) (Abstract, p.2/L11-13, p.3/L18-23) enrobed with a fruit flavored coating (p.8/L19-30).

Given et al. and Beharry are combinable because they are concerned with the same field of endeavor, namely, filled confectionery products. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used a peanut butter core and fruit flavored coating as taught by Beharry for the confectionery bar of Given et al. for the purpose of making a peanut and fruit flavored confectionery.

Further, given that modified Given et al. disclose a fruit flavored coating broadly, since it is well known that jelly is a type of fruit flavored coating, it would have been obvious to one of ordinary skill in the art at the time of the invention to have used any fruit flavored coating, including jelly, and arrive at the current invention.

Response to Arguments

13. Applicant's arguments filed 03/10/2009 have been fully considered but they are not persuasive.

Rejections under 35 USC §112, 2nd paragraph-

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Applicant argues that a person of ordinary skill in the art would understand the coverage encompassed by the phrases “substantially covers” and “substantially surrounds” when read in light of the specification.

Applicants’ argument is not persuasive. A coating that “substantially covers” or “substantially surrounds” a core may, for example, cover 85% of the core or 100% of the core. Given that substantially can be less than “all” (i.e. considerably) it is not clear how much of a core is enrobed when it is “substantially” covered or surrounded.

Regarding claims 10 and 14, Applicants find that Examiner is reading limitations into the claims that are not supported in the specification. Applicants submit that nowhere in the specification are yogurt and tomato sauce required to have “liquid-like rheological properties.” First, Applicant argues that in embodiments where the edible cores are frozen prior to coating with the soft edible layer, yogurt and tomato sauce would more likely display the properties of a solid. Second, Applicants believe that a person of ordinary skill in the art would understand based on paragraph [0018] of the specification that the edible core may be a central core of liquid coated with an outer coating to hold the liquid; The central core may be further coated with more than one coating to form the edible core.

There is no suggestion that yogurt and tomato paste are “required” to have “liquid-like rheological properties” rather, it is well established in the art that yogurt and tomato sauce exhibit “liquid-like rheological properties.” While the specification discloses an embodiment where the edible cores are frozen prior to coating, it is not clear from the method as claimed, that one would freeze tomato sauce to create an edible core to be coated. Further, while an edible

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core may comprise a central core of liquid and a coating to hold the liquid, these limitations are not claimed.

Regarding claims 11 and 12, Applicants clarify that a jelly is not both a base liquid and a dry component of the soft edible layer, but that a jelly is the edible layered component that can be formed on the edible core by coating the core with a base liquid, such as sugar solution, followed by applying a dry component, such as pectin with or without fruits or fruit derivatives. While a jelly may be formed by a coating a base liquid, such as sugar solution, followed by applying a dry component, such as pectin, the method, as claimed, also encompass coating a base liquid such as jelly, followed by a dry component, such as coconut. Given that the soft edible layer is defined by a base liquid and a dry component, it is not clear to one of ordinary skill in the art that the liquid component of jelly soft edible layer would be a sugar solution and the dry component would be pectin.

Rejections under 35 USC § 102(b)-

Applicants find that Given et al. fails to disclose all of the claimed elements and therefore cannot support an anticipation rejection under 35 USC §102(b). Applicants argue that the caramel coating with embedded nuts of Given et al. is clearly not a soft edible layer formed of an edible layered component selected from the group consisting of peanut butter, jelly, cheese, caramel, cream cheese, cookie dough or fruit.

Applicants argument is not persuasive given Given et al. clearly disclose applying a caramel coating (i.e. base liquid) and chopped nuts (i.e. dry component) to an edible core (Abstract, C3/L58-61) as presently claimed. While the hardness rating of a whole peanut is 9.5 as determined by Descriptive Analysis Testing in ASTM MNL13, the perceived hardness of

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chopped nuts will vary with particle size. Applicants have not demonstrated that the coating disclosed by Given et al. would not, in fact, exhibit the same hardness rating as the coating presently claimed.

Rejections under 35 USC § 103(a)-

Applicants find the Beharry is directed snack bars having a confectioner's coating based on cocoa butter or hardened vegetable oils that is applied in the melted state by dipping, pouring, spreading or the like. Applicants argue that the coating of Beharry is a conventional, fat-based coating that is not jelly. Further, Applicants argue that it would not have been obvious for one of ordinary skill in the art to substitute jelly for this confectioner's coating due to their very different compositions and physical properties.

While Beharry discloses enrobing a core (i.e. snack bar) with a confectioner's material (i.e. "conventional, fat-based coating"), the reference also disclose that the snack bar may be enrobed with other suitable material. Given Beharry disclose fruit flavored coatings broadly, since jelly is known to be a fruit flavored coating, it would have been obvious to one of ordinary skill in the art at the time of the invention to have coated using any fruit flavored coating, including jelly, and arrive at the current invention.

Conclusion

14. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth Gwartney whose telephone number is (571) 270-3874. The examiner can normally be reached on Monday - Friday; 7:30AM - 3:30PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./

Examiner, Art Unit 1794

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794